

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MATTHEW R. TONKIN and LAURIE
MCLELLAND, husband and wife,

Plaintiffs,

v.

CTX MORTGAGE COMPANY, LLC, et al.,

Defendants.

3:11-cv-270-RCJ-VPC

ORDER

Currently before the Court are a Motion for Leave to Intervene as Defendant (#24) and a Motion to Dismiss and to Expunge Lis Pendens (#25). The Court heard oral argument on March 19, 2011.

BACKGROUND

I. Facts

Plaintiffs Matthew Tonkin and Laurie McLelland ("Plaintiffs"), husband and wife, executed a note secured by a deed of trust on a piece of property located at 935 Flanders Road, Reno, Nevada, 89511, which was recorded in Washoe County on February 14, 2005. (Deed of Trust (#7-2) at 5, 7). The mortgage, dated February 11, 2005, was for \$549,600. (*Id.* at 6). The lender on the deed of trust was CTX Mortgage Company, LLC ("CTX Mortgage"). (*Id.*). The trustee on the deed of trust was John L. Matthews or Timothy M. Bartosh. (*Id.*). The Mortgage Electronic Registration Systems, Inc. ("MERS") was named as a "nominee for Lender's successors and assigns" and claimed to be the beneficiary¹ under the

¹ Despite the wording of the deed of trust, MERS is not a beneficiary to the deed of trust. See *Gomez v. Countrywide Bank, FSB*, 2009 WL 3617650 at *2 (D. Nev. 2009).

1 security instrument. (*Id.*).

2 On September 1, 2009, Plaintiffs defaulted on their mortgage. (See 2009 Notice of
3 Default (#7-2) at 25).

4 On December 4, 2009, MERS, as nominee for CTX Mortgage Company, executed² an
5 assignment of the deed of trust and transferred all beneficial interest in the deed of trust to
6 Citimortgage, Inc. (Assignment of Deed of Trust (#26-6) at 2).

7 On December 7, 2009, Cal-Western Reconveyance Corporation ("Cal-Western") filed
8 a notice of default and election to sell with the Washoe County Recorder's office. (2009
9 Notice of Default (#7-2) at 25). Todd Brachtenbach, an employee of First American Title,
10 acting as an agent for Cal-Western signed the notice of default. (*Id.* at 26). On March 15,
11 2010, First American Title recorded a certificate from the Nevada Foreclosure Mediation
12 Program indicating that no request for mediation had been made or the grantor had waived
13 mediation. (Mediation Certificate (#7-2) at 28). The certificate stated that the beneficiary
14 could proceed with the foreclosure process. (*Id.*). On September 24, 2010, Cal-Western filed
15 a notice of trustee's sale with the Washoe County Recorder's office. (Notice of Trustee's Sale
16 (#7-2) at 30).

17 On November 13, 2010, MTGLQ Investors, L.P., executed an assignment of the deed
18 of trust and assigned the deed of trust to Resi Whole Loan IV LLC. (Assignment of Deed of
19 Trust (#26-8) at 2-3).

20 On January 27, 2011, Citimortgage, Inc. executed and recorded an assignment of
21 mortgage and assigned the mortgage to MTGLQ Investors, L.P. (Assignment of Mortg. (#26-
22 7) at 2).

23 On March 22, 2011, Resi Whole Loan IV LLC executed a substitution of trustee
24 substituting Power Default Services, Inc. as the trustee for John L. Matthews or Timothy M.
25 Bartosh. (Substitution of Trustee (#26-10) at 2).

26 On March 23, 2011, Power Default Services, Inc. filed a notice of default and election
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28 ² The assignment of the deed of trust was notarized on September 3, 2010 and
recorded on September 10, 2010. (Assignment of Deed of Trust (#26-6) at 2).

1 to sell with the Washoe County Recorder's office. (2011 Notice of Default (#7-2) at 33). The
2 notice of default stated that the installment of principal, interest and impounds had become
3 due on December 1, 2009. (*Id.*).

4 On April 21, 2011, Cal-Western filed a notice of rescission of the 2009 notice of default
5 with the Washoe County Recorder's office. (Notice of Rescission (#7-2) at 36). On October
6 10, 2011, Power Default recorded a certificate from the Nevada Foreclosure Mediation
7 Program stating that the beneficiary could proceed with the foreclosure process because the
8 property was "non-applicable." (Mediation Certificate (#26-13) at 2). Power Default recorded
9 a notice of trustee's sale which scheduled the sale for October 31, 2011. (Notice of Trustee's
10 Sale (#26-14) at 2-3).

11 **II. Complaint**

12 On April 15, 2011, MERS and Citimortgage, Inc. ("Citi") filed a petition for removal and
13 attached Plaintiffs' 66-page complaint from the Second Judicial District Court in Washoe
14 County. (Pet. for Removal (#1); Compl. (#1-4)). In the complaint, Plaintiffs sued CTX
15 Mortgage Company, LLC; John L. Matthews or Timothy Bartosh; MERS; Cal-Western
16 Reconveyance Corporation; Citimortgage, Inc.; First American Title; and Todd Brachtenbach.
17 (Compl. (#1-4) at 2). Plaintiffs' complaint, originally filed on February 24, 2011, listed nine
18 causes of action. (*Id.* at 2, 30-62).

19 In the first cause of action, Plaintiffs alleged debt collection violations, pursuant to NRS
20 § 649.370, against Cal-Western, Citi, First American Title, Todd Brachtenbach, and MERS.
21 (*Id.* at 30). In the second cause of action, Plaintiffs alleged violations of Nevada's Unfair and
22 Deceptive Trade Practice Act, NRS § 598.0923, against Cal-Western, Citi, First American
23 Title, Todd Brachtenbach, and MERS because they did not have business licenses. (*Id.* at
24 33). In the third cause of action, Plaintiffs alleged violations of unfair lending practices, NRS
25 § 598D.100, against CTX Mortgage, John L. Matthews or Timothy M. Bartosh, MERS, Cal-
26 Western, Citi, First American Title, and Todd Brachtenbach. (*Id.* at 34-35). In the fourth cause
27 of action, Plaintiffs alleged violations of the covenant of good faith and fair dealing against Cal
28 Western, Citi, and MERS based on the deed of trust. (*Id.* at 36). In the fifth cause of action,

1 Plaintiffs alleged violations of NRS § 107.080 based on the notice of default filed by Cal-
 2 Western in 2009. (*Id.* at 39). In the sixth cause of action, Plaintiffs sought to quiet title. (*Id.*
 3 at 44). In the seventh cause of action, Plaintiffs alleged fraud in the inducement and through
 4 omission against Defendants for luring Plaintiffs into the loan by declaring that Plaintiffs were
 5 qualified for the loan. (*Id.* at 54, 56). In the eighth cause of action, Plaintiffs alleged slander
 6 of title against Cal Western, Citi, First American Title, and Todd Brachtenbach for filing a
 7 notice of default. (*Id.* at 60-61). In the ninth cause of action, Plaintiffs alleged abuse of
 8 process against Cal Western, Citi, First American, and Todd Brachtenbach. (*Id.* at 62).

9 In September 2011, the parties stipulated to dismiss Cal-Western and Citi with
 10 prejudice from this case. (See Order (#21) at 1).

11 DISCUSSION

12 I. Motion to Intervene as Defendant (#24)

13 Resi Whole Loan IV LLC ("Resi") files a motion to intervene in this case as a defendant.
 14 (Mot. to Intervene (#24) at 1). Resi argues that it is a real party in interest to this action
 15 because on November 13, 2010, MTGLQ assigned its beneficial interest in the deed of trust
 16 to Resi. (*Id.* at 3). Resi asserts that it should be able to intervene either as a matter of right
 17 or permissively. (*Id.* at 5, 7).

18 In response, Plaintiffs oppose the motion to intervene. (Opp'n to Mot. to Intervene
 19 (#29)).

20 Pursuant to Federal Rule of Civil Procedure 24(a), on a timely motion, the court must
 21 permit anyone to intervene who "claims an interest relating to the property or transaction that
 22 is the subject of the action, and is so situated that disposing of the action may as a practical
 23 matter impair or impede the movant's ability to protect its interest, unless existing parties
 24 adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

25 In this case, the Court grants Resi's motion to intervene. Although Resi does not have
 26 a valid assignment of the deed of trust and did not have the authority to execute a substitution
 27 of trustee, Resi does have an interest in the property because it is under the belief that its
 28 assignment and substitution were valid. Because Resi claims to be the current holder of the

1 beneficial interest of the deed of trust, Resi should be a party to this action. As such, the Court
2 grants the motion to intervene (#24).

3 **II. Motion to Dismiss and to Expunge Lis Pendens (#25)**

4 Resi files a motion to dismiss all claims in the complaint for failure to state a claim.
5 (Mot. to Dismiss (#25) at 7-19). Resi also seeks to expunge the lis pendens. (*Id.* at 1).

6 In response, Plaintiffs argue that the motion to dismiss should be denied because Resi
7 did not have a valid assignment of the deed of trust. (Opp'n to Mot. to Dismiss (#30) at 3).
8 Plaintiffs argue that MTGLQ purported to assign the deed of trust to Resi on November 13,
9 2010, but MTGLQ did not have a valid assignment itself until January 27, 2011. (*Id.*).

10 In this case, Plaintiffs' original complaint challenged the validity of the 2009 notice of
11 default. Plaintiffs filed their original complaint prior to the filing of the 2011 notice of default
12 and the rescission of the 2009 notice of default. As such, Plaintiffs have not stated any
13 causes of action against any potential defendants involved in the 2011 notice of default.
14 Because MTGLQ did not have the authority to execute an assignment of the deed of trust to
15 Resi on November 13, 2010, Resi did not have the authority to execute a substitution of
16 trustee. (See Assignment of Deed of Trust (26-8) at 2-3; Assignment of Mortg. (#26-7) at 2).
17 Therefore, it appears that the 2011 notice of default contains statutory defects pursuant to
18 NRS § 107.080. The Court denies Resi's motion to dismiss (#25) and grants Plaintiffs leave
19 to amend their complaint to include claims involving the potential statutory defects in 2011
20 notice of default.

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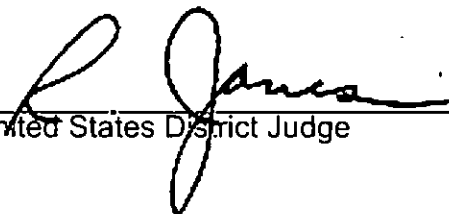
CONCLUSION

For the foregoing reasons, IT IS ORDERED that the Motion to Intervene (#24) is GRANTED.

IT IS FURTHER ORDERED that the Motion to Dismiss (#25) is DENIED.

IT IS FURTHER ORDERED that the Court GRANTS Plaintiffs leave to amend their complaint to include claims involving potential statutory defects in the 2011 notice of default.

DATED: This 11th day of May, 2012.


United States District Judge